No. 899-900

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1940

MAX HAMBURGER,

Petitioner,

vs.

JOHN A. DYER, TRUSTEE; LOUIS H. CHARBONNEAU, THOMAS N. DYSART AND HAROLD McB. THURSTON, constituting The Belcrest Apartments First Mortgage Bondholders' Committee; and MELVIN L. STRAUS AND CARL S. WELLES, indenture trustees,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To The Honorable: The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Max Hamburger, herewith applies for the issuance of Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review its judgments of January 17, 1941 affirming the decisions of the district court.

STATEMENT OF THE CASE

Preliminary Statement

These proceedings originated in the district court on respective petitions filed by Max Hamburger, the petitioner here, and Jacob Singer under Chapter XII of the Chandler Act. Subsequently these causes were consolidated for the purpose of administration because the principal asset was owned jointly. The district court on February 7, 1940 and February 19, 1940 entered certain orders from which appeals were taken by both Hamburger and Singer to the Circuit Court of Appeals in cause No. 8718 of that court. Subsequently, the district court on July 22, 1940 entered an order confirming a bondholders' committee's arrangement over their objections. They thereupon appealed to the Circuit Court of Appeals in cause No. 8822. That court consolidated the first two appeals, considered all three together, and on January 17, 1941 decided them in a single opinion. In this petition and the supporting brief reference must necessarily be had to the records in both Circuit Court cases as supplemented and filed with this court. Reference to the record in the first appeals, the larger record, will be indicated by "F. R." Reference to the record in the second appeal will be indicated by "S. R."

Statement of Facts

In 1925 petitioner Hamburger erected a large apartment hotel known as the Belcrest Hotel in the City of Detroit, Michigan (F. R. 25). A trust mortgage was executed thereon in the principal amount of $1,250,000 and bonds secured thereby were executed and sold to the public at large (F. R. 16-27). Later in the same year petitioner

sold a one-half interest in the property to Singer who did not however assume or agree to pay the mortgage (F. R. 51, 76). In 1929 Hamburger executed to Lulu E. Powers, as trustee, a quit claim deed as security covering the Belcrest and other property (F. R. 78-79) and at about the same time Singer did likewise (F. R. 78-79).

In 1930 petitioner and Singer turned over control and operation of the Belcrest Hotel to the trustees under the first trust mortgage. Later, that mortgage having gone into default, while the Belcrest was under the management and control of the trustee, the trustees filed their bill to foreclose in the state court, but no decree was ever entered (F. R. 35). Default also having occurred under the agreement pertaining to the quit claim deeds given to Lulu E. Powers, as trustee, foreclosure proceedings were begun thereon in the state court, but no decree was ever entered (F. R. 35).

On July 4, 1939 petitioner Hamburger and Singer filed their respective petitions with the district court under Chapter XII of the Chandler Act praying for relief thereunder (F. R. 13, 56). Made part of each of these petitions were schedules of assets and liabilities, statements of affairs and their proposed arrangement. On July 7, 1939 the court accepted jurisdiction, approved their petitions as properly filed under Chapter XII and appointed John A. Dyer, one of the respondents herein, trustee, (F. R. 57, 59). Subsequently on July 19, 1939 the court consolidated the causes for administration.

On February 7, 1940 the district court finding that the principal indebtedness on the first trust mortgage on the Belcrest Hotel was considerably in excess of the value of the property ordered that the claims of all creditors

(whether related to the Belcrest or not) subject and inferior to the unsubordinated bonds were without value and without right to participate in or vote upon *any* arrangement and that the debtors were without equity or interest of value in the premises and had no right to participate in *any* arrangement (F. R. 70-71). Later, on February 19, 1940, the court entered an order calling the first meeting of creditors to consider debtors' offer and also certain arrangements proposed by the bondholders' committee and by one Kowal. In that order the court directed the respondent trustee to mail out to creditors, along with the notice of the meeting, the proposed arrangement of the debtors as well as the proposed arrangements of the others together with a copy of the order of February 7, 1940 (F. R. 83-104). Petitioner and Singer appealed from these orders to the Circuit Court of Appeals (F. R. 71-73, 104-105) which consolidated them in cause No. 8718.

Meanwhile on July 22, 1940 the district court over the protests of debtors entered an order confirming the arrangement sponsored by the bondholders' committee, which of course entirely eliminated debtors from participation (S. R. 19-25). Debtors objected on the grounds, among others: That the bondholders' committee having failed to take the proper proceedings before the Public Trust Commission by whom it was licensed was without authority to propose or sponsor an arrangement; that the arrangement of the committee had neither been approved nor accepted by the debtors; and that in any event the arrangement was unfair and inequitable inasmuch as it amounted to a reorganization and liquidation of debtors' assets as distinguished from an arrangement; and that no proper provision was made for other creditors such as to discharge their claims in these proceedings

(F. R. 106-108). Debtors also objected to the order of confirmation on the ground that it was necessarily based upon the erroneous prior orders of February 7, 1940 and February 19, 1940, which eliminated debtors from participation in *any* arrangement and from the opportunity of presenting an amended arrangement.

On August 20, 1940 petitioner and Singer prosecuted their appeal to the Circuit Court of Appeals from this order of confirmation (S. R. 25). The Circuit Court of Appeals considered all three appeals simultaneously and on January 17, 1941 rendered its opinion affirming the orders of the district court. On the same day orders were entered by the court accordingly (F. R. 211, S. R. 43).

On February 12, 1941 the Circuit Court entered its order staying mandate in each of the causes for a period of thirty days to enable this petition for Certiorari to be filed (F. R. 217, S. R. 49). Subsequently on March 10, 1941 the stay was extended an additional fifteen days. Since the order for this additional stay was entered after the record was certified by the clerk of the Circuit Court, a copy is annexed to the brief in support of this petition and marked Appendix "A".

The Circuit Court of Appeals held, against debtors, that they and creditors other than unsubordinated bondholders were properly barred from participation; that their consent was not necessary to the confirmation of the arrangement proposed by the bondholders' committee; and that the decisions of this court under Chapter X were applicable to proceedings under Chapter XII of the Chandler Act. However, the court upheld the contentions of debtors that it was error to submit, before the first

meeting, creditors' proposals simultaneously with debtors'; that it was error to classify petitioner's individual and unrelated debts with those of Singer of the same nature; and that the arrangement confirmed did not discharge any obligations of debtors other than the unsubordinated bonds. But, it said, these errors were harmless.

QUESTIONS PRESENTED

1. In a proceeding under Chapter XII of the Chandler Act, where a secured debt is greater than the value of its security, can the court, *ipso facto,* say that debtor has no claim or equity of value and cannot participate in any arrangement which may be proposed.

2. In a proceeding under Chapter XII of the Chandler Act, where a secured debt is greater than the value of its security, can the court, *ipso facto,* say that other creditors have no interest of value and no right to participate in or vote upon an arrangement which also makes provisions for their separate benefit that do not affect the secured debts and the security?

3. In a proceeding under Chapter XII of the Chandler Act can the court bar creditors other than those holding unsubordinated bonds from participating in an arrangement and from settling their claims with debtor?

4. In a proceeding under Chapter XII of the Chandler Act can the court confirm an arrangement of the bondholders' committee which provides only for bondholders and makes no provision for debtor or other creditors solely because the value of their security is exceeded by the amount due on their bonds?

5. In a proceeding under Chapter XII of the Chandler Act can the court confirm an arrangement sponsored by the bondholders' committee, which provides only for themselves and no other class of creditors, especially when that arrangement has neither been consented to nor accepted by the debtor?

6. In a proceeding under Chapter XII of the Chandler Act, can the court, over objection of debtor, confirm an arrangement which provides only for one class of claims and leaves all others undischarged?

7. In a proceeding under Chapter XII of the Chandler Act can the court confirm an arrangement proposed by the bondholders' committee without a prior finding that such committee is a proper creditor and is authorized to act by the Public Trust Commission of the state of its organization which has licensed it?

REASONS FOR ALLOWANCE OF THE WRITS

The decision of the Circuit Court of Appeals has destroyed the generally accepted understanding of Chapter XII, and has effectively destroyed its purpose and usefulness. The questions involved (noted below) are of vital importance to individual debtors, and so far as we have been able to ascertain, have not been passed upon by any other court.

1. Is a real property arrangement under Chapter XII governed by the principles of compositions or by the absolute priorities rule of Chapter X? The Circuit Court's decision that arrangements are not compositions is in conflict with *Canada Southern Ry. Co. v. Gebhard,* 109 U.S. 527.

2. In such a proceeding has a debtor a right to make an offer to all classes of his creditors even though a secured debt is greater than the value of its security, or can the court bar him completely because of this fact?

3. In such a proceeding is an offer by a debtor which gives his creditors more than they will obtain on liquidation "fair and reasonable"?

4. In such a proceeding, if one offer by debtor is insufficient has he a right to make an amended offer, or can the court bar him completely?

5. In such a proceeding can a debtor who has voluntarily come into court because of his insolvency be compelled to accept an offer of one class of creditors which eliminates him and all other creditors?

6. In such a proceeding can the court without debtor's consent confirm an arrangement which provides for only class of creditors and leaves all other debts undischarged and undischargeable for at least the next six years, especially where debtor has made an offer of settlement to each and every class?

7. What relief can be obtained by an individual debtor under Chapter XII who seeks the aid of the court on the statutory ground of insolvency?

8. If a debtor in such proceeding cannot obtain the requisite consents of his creditors to his proposal, can he demand dismissal of the proceeding or adjudication of bankruptcy so that he can obtain complete relief from all debts?

9. Can a bondholders' committee invoke the jurisdiction of the Federal court without complying with the requirements of the state laws creating and controlling it?

These questions are novel and should be decided by this court in order to settle the practice in such cases so that individual debtors may be apprised of the relief or the limitations of the relief that may be had under Chapter XII.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays for the allowance of the Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in causes No. 8718 and No. 8822 respectively of that court to the end that such causes may be reviewed and decided by this Court and that the judgments of said Circuit Court of Appeals be reversed and for such other relief as to this Court may seem proper.

MAX HAMBURGER,
Petitioner.

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